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No. 02-358

Supreme Court U.S.
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IN THE

Supreme Court of the United States

GEORGE E. PATAKI, in his official capacity as Governor of the State of New York, *et al.*,

Petitioners,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

LAWRENCE MALONE
General Counsel
KEVIN M. LANG
Assistant Counsel
New York State
Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350
(518) 474-2510

ELIOT SPITZER
Attorney General of the State of New York
CAITLIN J. HALLIGAN*
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
PETER H. SCHIFF
Senior Counsel
LAURA ETLINGER
Assistant Solicitor General
120 Broadway
New York, NY 10271
(212) 416-8016

* *Counsel of Record*

Attorneys for Petitioners Pataki and Public Service Commission Members

177146

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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REPLY BRIEF

1. Consolidated Edison Company of New York, Inc. (Con Edison) incorrectly contends that the applicability of Bill of Attainder Clause protections to corporations is settled because courts have assumed the Clause applies to corporations. Inasmuch as no previous court has found a corporation to satisfy the Bill of Attainder Clause's three-pronged test for invalidating legislation, *Consolidated Edison Company of New York, Inc. v. Pataki*, 292 F.3d 338, 347 (2d Cir. 2002), there has been little reason to litigate the potentially troublesome question of whether corporations warrant bill of attainder protection. The Second Circuit's decision, however, brings the unsettled question to the forefront not only because it applies bill of attainder protection to corporations, but, as indicated in our petition, it uses an

unprecedented, highly exacting functional test for determining whether legislation "punishes" a corporation.

Further, Con Edison asserts that the uniqueness of Chapter 190 is a reason to deny the petition. By their very nature, and inherently, statutes raising bill of attainder concerns are unique in their facts and in their legislative response, more so than any other matter of constitutional controversy. What is not unique is the application of principles of law to such situations. The decision of the Second Circuit to explicitly apply bill of attainder protections to corporations differs with the decisions of other Circuits as to the nature of that application and the creation of a new set of tests and standards.

2. Although this Court has held that legislation that reasonably furthers non-punitive purposes is not punishment under the functional test, the Second Circuit found that Chapter 190 constituted punishment because Con Edison was denied recovery of all power replacement costs associated with the Indian Point 2 outage, including those associated with maintenance, refueling and replacement of the generators (292 F.3d at 351-353). Con Edison argues that the Second Circuit's application of the functional test was not premised on requiring a close fit between Chapter 190's purpose (maintaining just and reasonable rates) and its remedy. According to the utility, the *uncontroverted record evidence* (a reply affidavit of a utility attorney (A-1360) and oral argument by another company attorney before the District Court (A-1375)) established that 60% of the cost recovery denied Con Edison had nothing to do with the Indian Point 2 plant outage (Con Edison, p. 19).

Con Edison's claim of uncontroverted record evidence is wrong. An attorney's affidavit on a highly technical issue and unsubstantiated claims at oral argument are not evidence and all defendants at the District Court denied the utility's assertion in their answers (A-205; A-677; A-1088). In any event, Con Edison's mischaracterization of the record does not answer

our point that the Second Circuit's close fit functional test is unprecedented.

3. The Second Circuit suggested that Con Edison's equal protection argument was baseless and it did not address the utility's claims regarding procedural due process, Atomic Energy Act preemption and the Contracts Clause. In an apparent attempt to dissuade the Court from examining whether Chapter 190 is a bill of attainder, the utility nonetheless asserts each theory in its response. The utility's contentions are both incorrect and irrelevant to whether the Second Circuit's decision warrants review.

With regard to equal protection, inasmuch as Chapter 190 admittedly advances the crucial public purpose of safeguarding the consumer's right to just and reasonable rates and Con Edison was the only nuclear operator in New York still using the known-defective Model 44 generators, Con Edison represents a legitimate class of one. *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

This Court has long recognized that statutory enactments are not subject to attack under the Due Process Clause for lack of notice and an opportunity to be heard prior to the statute's enactment. *See, e.g., Chesebro v. Los Angeles Cty. Flood Control Dist.*, 306 U.S. 459, 464 (1939); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 304-305 (1933); *Spencer v. Merchant*, 125 U.S. 345, 353 (1888). Con Edison's citation to case law involving administrative proceedings is therefore inapposite and, under the proper standard, its due process claim fails.

As this Court indicated in *Pacific Gas and Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 198 (1983), the Atomic Energy Act was not intended to diminish the states' authority to assure "just and reasonable"

retail electric rates. Because Chapter 190's primary purpose was to maintain "just and reasonable" rates, Con Edison's preemption theory is without merit. *See* 461 U.S. at 211-212.

Finally, Con Edison's claim that the Commission's 1997 rate opinion represented an "agreement" between the utility and the Commission (Con Edison, pp. 4, 27-28) is incorrect. The Commission was not a party to negotiations with Con Edison in its 1997, or any other, rate proceeding. *Matter of MCI Telecommunication Corp. v. Public Serv. Comm'n*, 231 A.D.2d 284, 291, 659 N.Y.S.2d 563, 569 (3d Dep't 1997) (wherein the court noted that the Commission is the decisionmaker in its proceedings, not a party to negotiations between utilities, Department staff and other parties). Under settled New York law, the Commission's rate order did not represent a contract with Con Edison. *Matter of United Water New York, Inc. v. Public Serv. Comm'n*, 252 A.D.2d 810, 811, 676 N.Y.S.2d 709, 711 (3d Dep't 1998); *Matter of Kessel v. Public Serv. Comm'n*, 193 A.D.2d 339, 344, 603 N.Y.S.2d 905, 908 (3d Dep't 1993).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ELIOT SPITZER
Attorney General of the
State of New York
CAITLIN J. HALLIGAN*
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
PETER H. SCHIFF
Senior Counsel
LAURA ETLINGER
Assistant Solicitor General
120 Broadway
New York, NY 10271
(212) 416-8016

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